

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:RFPH:STP  
TDGunn

date: April 27, 2002

to: (b)(7)a Revenue Agent  
through Lynn Glauber, Team Manager

from: Associate Area Counsel  
(Large and Mid-Size Business)

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subject: (b)(7)a Consent Forms

You have inquired regarding the validity of previously signed consents to extend the statute of limitations. Additionally, you have requested advice as to the proper format to execute additional consents following an organizational restructuring by the taxpayer.

Issues

1. Are the previously signed consents valid, even though the signing entity did not exist as of the time of the execution of the consent?
2. How should future consents for those dissolved organizations be executed in light of the taxpayer restructuring?

Conclusion

1. (b)(7)a
- 

2. Future consent to extend the statute should be executed using the recommended language given below for each entity.

Facts

(b)(7)a owns and operates several

concerns. These companies were held in an organizational structure that culminated in the [REDACTED] Revocable Living Trust ("Trust"), a grantor-retained trust.

The Trust owned all the issued and outstanding stock for the following four corporations: [REDACTED] ("[REDACTED]"), [REDACTED] ("[REDACTED]"), [REDACTED], also referred to as [REDACTED], and [REDACTED] ("[REDACTED]"). The Trust also owned an [REDACTED]% interest in [REDACTED] ("[REDACTED]"). The other [REDACTED]% interest was held by an unrelated, outside investor.

[REDACTED] was the general partner of and owned [REDACTED]% of the partnership interest in four partnerships: [REDACTED] ("[REDACTED]"), [REDACTED], [REDACTED], and [REDACTED]. For these four except [REDACTED], the [REDACTED]% limited partner was [REDACTED]. [REDACTED]'s other [REDACTED]% interest was held by [REDACTED], a limited partner. [REDACTED] also owned all the issued and outstanding stock for two corporations: [REDACTED] ("[REDACTED]") and [REDACTED] ("[REDACTED]"). [REDACTED] and [REDACTED]'s only assets were a respective [REDACTED]% partnership interest in [REDACTED] and [REDACTED]. [REDACTED] and [REDACTED] were also the general partner for [REDACTED] and [REDACTED] respectively. [REDACTED] held a [REDACTED]% interest in [REDACTED].

[REDACTED] held a [REDACTED]% partnership interest in and was general partner of [REDACTED]. [REDACTED]'s other [REDACTED]% was held by the limited partner, [REDACTED].

Prior to reorganization, [REDACTED], [REDACTED], and [REDACTED] were the three partners of [REDACTED]. Their respective interests in [REDACTED] were: [REDACTED]%, [REDACTED]%, and [REDACTED]%. [REDACTED] in turn held a [REDACTED]% interest in [REDACTED]. The remaining interest in [REDACTED] was held [REDACTED]% by [REDACTED], the general partner, and [REDACTED]% by unrelated outside investors. Please refer to the attached organizational chart titled "Pre-Reorganization" for a depiction of the ownership structure.

The eleven entities that are under exam are: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. The entities that are under exam are the shaded entities on the Pre-Reorganization Chart attached. The years that are under exam are TYE [REDACTED] and TYE [REDACTED].

Previously, the Service and these eleven entities executed two sets of consents to extend the statute of limitations. The first set of consents were executed in [REDACTED] and extended

the statute to [REDACTED]. The second set of consents, executed in [REDACTED], extended the statute to [REDACTED]. The Service and the taxpayer-entities intend to further extend the statute to [REDACTED].

The organization of these companies went through a restructuring in [REDACTED]. The impact of the restructuring is shown on the chart attached to this memorandum titled "Post-Reorganization." The restructuring can be summarized as follows.<sup>1</sup>

[REDACTED] redeemed the [REDACTED]% partnership interest held by [REDACTED]. [REDACTED] was dissolved and all assets and liabilities of [REDACTED] were transferred to [REDACTED]. [REDACTED] merged into [REDACTED], bringing with it all its assets and liabilities. [REDACTED] merged into [REDACTED], along with its assets and liabilities. [REDACTED] sold its [REDACTED]% general partnership interest in [REDACTED], to a newly formed entity, [REDACTED]. [REDACTED] then contributed its partnership interest in [REDACTED], to another newly formed entity, [REDACTED] in exchange for stock of [REDACTED] and the assumption of all liabilities and payables owed to [REDACTED] by [REDACTED].

[REDACTED] subsequently merged in [REDACTED], with [REDACTED] assuming all the assets and liabilities of [REDACTED]. [REDACTED] was liquidated into [REDACTED] following the former partner's contribution of their partnership interest to [REDACTED] in exchange for stock. [REDACTED] became an LLC, wholly owned by [REDACTED], disregarded for federal income tax.

Following the restructuring, the organization of the companies had changed significantly. The Trust now wholly owned [REDACTED], [REDACTED] and [REDACTED], all of which are S corporations. [REDACTED] remained the [REDACTED]% general partner for [REDACTED], and became a [REDACTED]% general partner for a newly formed entity, [REDACTED]. [REDACTED] now held the [REDACTED]% limited partnership interest in [REDACTED] along with a [REDACTED]% stock interest in [REDACTED]. [REDACTED] holds a [REDACTED]% interest in [REDACTED] a [REDACTED]% interest in [REDACTED], and a [REDACTED]% interest in [REDACTED].

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<sup>1</sup> The description of the restructuring is given by the taxpayer. Counsel has not examined the reorganization documents or corporate minutes; taxpayer stated that the documentation was voluminous and would require a great deal of effort to extract the documents and considerable time to review them. The advice contained herein is predicated upon the facts as given above; any subsequent change in material facts may affect the advice. Therefore, we strongly recommend that all corporate resolutions, minutes or other authorizations detailing the reorganization be requested from taxpayer and reviewed as quickly as possible to confirm the taxpayer's recitation of fact.

The remaining interests in [REDACTED] are held by two outside, unrelated investors in the amounts of [REDACTED]% and [REDACTED]%.

[REDACTED], a C corporation, now owns [REDACTED]% of the following: [REDACTED], [REDACTED], [REDACTED] LLC (disregarded entity), [REDACTED] LLC (disregarded entity), [REDACTED] LLC (disregarded entity), and [REDACTED]. [REDACTED] also owns a [REDACTED]% interest in [REDACTED]. [REDACTED] holds a [REDACTED]% interest in [REDACTED]. Please refer to the organizational chart titled "Post-Reorganization" for a depiction of the new structure, attached.

This restructuring was not communicated to the IRS until after the consents had been executed and the original three year statute had closed. The issue first came to light when the third set of consents were prepared and sent to the controller of this group of companies. The controller informed the Service that due to the restructuring, many of the companies that had previously executed the consent were not in existence when the consent was executed. The controller further informed the IRS that the prepared consents had signatories that were no longer viable entities. In other words, the first two sets of consents were executed either by tax matters partners or by officers of corporations that did not exist at the time of the execution.

The consents may be grouped into three different categories. The first group of consents can be called the "[REDACTED] consents." This set of consents was executed for certain partnerships by [REDACTED] as Chief Executive Officer of [REDACTED] which is the designated Tax Matters Partner ("TMP") on the tax returns for the partnerships for the years under exam. The consents in this group were signed as "[REDACTED] Chief Executive Officer of [REDACTED] Tax Matters Partner." The companies that executed these consents are: [REDACTED] in its own capacity ([REDACTED]'s consent did not have [REDACTED] listed as Tax Matters Partner), [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

The second set of consents were for [REDACTED] and [REDACTED]. These two consents were executed by [REDACTED] and [REDACTED] respectively, by [REDACTED]'s CEO, [REDACTED] and by [REDACTED]'s CEO, [REDACTED]. Additionally, these two consents also have a second signature by [REDACTED] in his capacity as CEO of [REDACTED] as an "authorized person."

The third set of consents are comprised of the consents executed by [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. These consents are signed by [REDACTED] as "Trustee, [REDACTED] Revocable Living Trust, Tax Matters Person." The [REDACTED] consent

further lists [REDACTED] as "Owner" of [REDACTED], the Tax Matters Partner.

Upon learning that the consents were executed in this manner subsequent to the restructuring, the Revenue Agent, (b)(7)a [REDACTED] contacted Counsel to inquire as to the validity of the previously executed consents and as to the proper method to execute future consents.

## Discussion

### I. Applicable Law

#### A. Authority to Sign Consents

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service applies the rules applicable to the execution of the original returns to the execution of consent to extend the time to make an assessment. Rev.Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev.Rul. 84-165, 1984-2 C.B. 305. In the case of corporate returns, § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. In the case of partnerships, § 6229(b)(1)(B) provides that the tax matters partner is authorized to sign a consent to extend the period to assess tax.

The Revised Statutes of the State of Missouri provide that in the case of both corporations and partnerships, a corporate agent (officer or director) or partner may take actions to wind up the business affairs of the respective corporation or partnership. Mo. Rev. Stat. §§ 351.476 and 358.350 (1999). The statutes further provide that in the case of a merger or consolidation, the surviving corporation "shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger of consolidation had not taken place..." Mo.Rev.Stat. § 351.450 (1999).

Per the representations of the companies' controller, where applicable the surviving new companies took all the rights and assumed all of the obligations of the dissolved companies as its own. This is without examining the merger documentation to verify the exact language of the distribution of assets and liabilities.

It has been held that taxes are debts or liabilities. United States v. Scott, 167 F.2d 301 (8<sup>th</sup> Cir. 1948). It follows that the newly formed companies, who became primarily liable for the tax liabilities of the defunct companies, has the power under Missouri state law to extend the statute of limitations for its own direct liability. Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985).

This holding is also confirmed in Revenue Ruling 59-399. This Revenue Ruling held that the successor corporation may validly execute a Form 872 to extend the period of the statute of limitations. Rev.Rul. 59-399, 1959-2 C.B. 488.

#### **B. Burden of Proof**

The bar to the period of limitations in which to assess tax is an affirmative defense and the party raising it must specifically plead it and carry the burden of proof with respect thereto. Adler v. Commissioner, 85 T.C. 535, 540 (1985); T.C. Rule 142(a). Petitioners make a prima facie case by proving the filing date of the return. Miami Purchasing Service Corp. v. Commissioner, 76 T.C. 818, 823 (1981); Robinson v. Commissioner, 57 T.C. 735, 737 (1972), and showing that the notice of deficiency was issued beyond the normally applicable limitations period. Adler, supra at 540.

The burden of going forward then shifts to respondent to introduce evidence showing that the bar of the period of limitations is inapplicable. Miami Purchasing Service Corp. supra at 823. Pursuant to section 6501(c)(4), respondent can meet his burden by showing that the statutory notice of deficiency was mailed prior to the expiration of the agreed limitations period, pursuant to a consent which is valid on its face. Adler, supra at 541. A consent is valid on its face if it identifies the taxpayers, bears their signature, identifies the year, and was dated prior to the expiration of the then existing limitation period. The Service bears the burden of proof to show the consent is valid on its face.

#### **C. Transferee Liability**

The Commissioner may collect, from a transferee or successor transferee, unpaid income taxes of a transferor of assets. § 6901(a). See also Commissioner v. Stern, 357 U.S. 39, 42 (1958). In this case, Missouri state law will determine the extent of a transferor's liability. Id at 45. The Commissioner bears the burden of proof that the taxpayer is liable as a transferee under local law or in equity. § 6902(a), T.C. Rule 142(d). The petitioner has the burden of proof that the

transferor is not liable for tax or additions to tax pursuant to  
§ 6902(a).

II. Validity of Consents

(b)(7)a



(b)(7)a



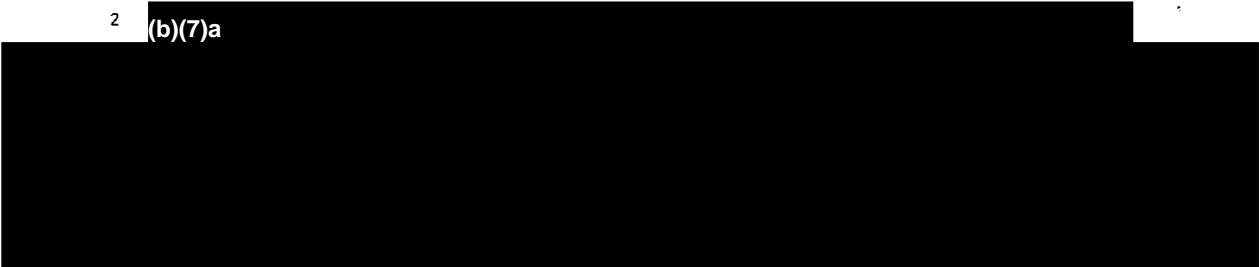
(b)(7)a



(b)(7)a



<sup>2</sup> (b)(7)a



(b)(7)a



(b)(7)a

(b)(7)a



(b)(7)a



(b)(7)a



### III. Potential Hazards

(b)(7)a





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IV. Transferee Liability and Consent

In addition to the Form 872 consent forms as given below, we recommend that you obtain Form 2045, Transferee Agreement, and Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax against a Transferee or Fiduciary. We note that you should not rely on Form 2045 as sufficient evidence to meet the Service's burden of proof with respect to transferee liability. Case law suggest that the execution of Form 2045 merely provides the evidence of transferee liability. Southern Pacific Transportation Corp. v. Commissioner, 84 T.C. 367, 374 (1985).

These entities were either merged or dissolved and transferred their assets to another entity and therefore will require that Form 977 and Form 2045 be executed in the manner given below: [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. These entities did not merger or dissolve and retained substantially all of their assets, therefore, Form 977 and Form 2045 will not be necessary for: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

The following table shows the transferor/transferees:

<u>Transferor</u>	<u>Transferee</u>
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Because [REDACTED] and [REDACTED] merged into a single-member entity

LLC disregarded for federal income tax purposes, it is unclear which entity is the transferee. Therefore, both the new LLC and the parent are listed and Form 977 and 2045 should be executed for both listed transferees.

The Form 2045 should be executed by the transferees for the respective transferors listed above. In the case of [REDACTED] and [REDACTED], this will mean two Forms 2045 for each. Form 977 should be executed in the following manner (using [REDACTED] and [REDACTED] as an example):

On the appropriate title line:

[REDACTED] as transferee of [REDACTED] \*

On the signature line:

by [REDACTED], Chief Executive Officer

With the following notation at the bottom of the page:

\* This is with respect to the tax liability of [REDACTED]  
[REDACTED] for the tax years ended [REDACTED] and [REDACTED].

The other Forms 977 should be executed in a similar fashion. These forms are in addition to the consent forms discussed below.

#### V. Form for Future Consents

We recommend the following formats for each respective company for the execution of future consents:

[REDACTED]

It is our advice that [REDACTED] should execute two consents. The first consent should be executed by [REDACTED] and captioned as follows:

On the line labeled "CORPORATE NAME" enter:

[REDACTED] (EIN: \_\_\_\_\_),

On the line labeled "CORPORATE OFFICER(S) SIGN HERE" enter:

by [REDACTED], Chief Executive Officer

The second consent should be executed by [REDACTED] and captioned as follows:

On the line labeled "CORPORATE NAME" enter:

[REDACTED] (EIN: \_\_\_\_\_), as successor in interest to  
[REDACTED] (EIN: \_\_\_\_\_) \*

On the line labeled "CORPORATE OFFICER(S) SIGN HERE" enter:  
by [REDACTED], Chief Executive Officer

With the following footnote at the bottom of the page:

\* This is with respect to the several liability of [REDACTED]  
for [REDACTED] (EIN: [REDACTED]) for the taxable  
years ending [REDACTED] and [REDACTED].

[REDACTED]

The consent for [REDACTED] should be executed by [REDACTED] as follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
[REDACTED] (EIN: [REDACTED]), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by [REDACTED], Chief Executive Officer

[REDACTED]

The consent for [REDACTED] should be executed by the Trust as follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
[REDACTED] Revocable Trust (EIN: [REDACTED])

On the line labeled "Tax Matters Partner sign here" enter:  
by [REDACTED], Trustee

[REDACTED]

The consent for [REDACTED] should be executed by the Trust as follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
[REDACTED] Revocable Trust (EIN: [REDACTED])

On the line labeled "Tax Matters Partner sign here" enter:  
by [REDACTED], Trustee

[REDACTED]

Two consents for [REDACTED] should be executed as follows.  
The first consent should designate [REDACTED] as the TMP and be executed  
by [REDACTED] as follows:

Above the line labeled "Tax Matters Partner sign here" enter:

██████████ (EIN: \_\_\_\_\_), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████, Chief Executive Officer

The second consent should be executed by ██████████

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: \_\_\_\_\_), as successor in interest to  
██████████ (EIN: \_\_\_\_\_)\*

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████, Chief Executive Officer,

With the following footnote at the bottom of the page:

\* This is with respect to the several liability of ██████████  
for ██████████ (EIN: \_\_\_\_\_) for the taxable years ending  
██████████ and ██████████.

██████████

Two consents should be executed for ██████████ as well. The  
first consent should be executed by ██████████ as follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: \_\_\_\_\_), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████, Chief Executive Officer

The second consent should be executed by ██████████ as follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: \_\_\_\_\_) as successor in interest to  
██████████ and sole owner of the membership interests  
in ██████████ LLC, a disregarded entity for federal income  
tax purposes.\*

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████, Chief Executive Officer

With the following footnote at the bottom of the page.

\* This is with respect to the several liability of ██████████  
██████████, for ██████████ (EIN: \_\_\_\_\_) for the  
taxable years ending ██████████ and ██████████.

██████████  
The consent for ██████████ should be executed by ██████████ as follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: \_\_\_\_\_), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████, Chief Executive Officer

followed by a second signature as an authorized person executed  
by ██████████.

On the line labeled "Authorized Person Sign Here" enter:  
██████████ (EIN: \_\_\_\_\_) as successor in interest to  
██████████ (EIN: \_\_\_\_\_)

Below that enter:  
by ██████████, Chief Executive Officer

██████████  
Two consents should be executed for ██████████. The first  
consent should be executed by ██████████ as follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: \_\_\_\_\_), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████, Chief Executive Officer

The second consent should be executed by ██████████ as  
follows:

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: \_\_\_\_\_) as successor in interest to  
██████████ (EIN: \_\_\_\_\_) and as sole  
shareholder of ██████████ (EIN: \_\_\_\_\_) successor in  
interest in ██████████\*, Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████, Chief Executive Officer

With the following footnote at the bottom of the page.

\* This is with respect to the several liability of ██████████

(EIN: \_\_\_\_\_) for \_\_\_\_\_ for the taxable years ending \_\_\_\_\_ and \_\_\_\_\_.

Two consents should be executed for \_\_\_\_\_. The first consent should be executed by \_\_\_\_\_ as follows:

Above the line labeled "Tax Matters Partner sign here" enter: \_\_\_\_\_ (EIN: \_\_\_\_\_), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter: by \_\_\_\_\_ Chief Executive Officer

The second consent should be executed by \_\_\_\_\_ as follows:

Above the line labeled "Tax Matters Partner sign here" enter: \_\_\_\_\_ (EIN: \_\_\_\_\_), successor in interest to \_\_\_\_\_ (EIN: \_\_\_\_\_)\* Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter: by \_\_\_\_\_ Chief Executive Officer

With the following footnote at the bottom of the page.

\* This is with respect to the several liability of \_\_\_\_\_ (EIN: \_\_\_\_\_) for \_\_\_\_\_ (EIN: \_\_\_\_\_) for the taxable years ending \_\_\_\_\_ and \_\_\_\_\_.

\_\_\_\_\_ is now a single-member entity LLC disregarded for federal income tax purposes. It will require two consents which should be executed as follows. The first consent should be executed by \_\_\_\_\_ as below.

Above the line labeled "Tax Matters Partner sign here" enter: \_\_\_\_\_ (EIN: \_\_\_\_\_), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter: by \_\_\_\_\_ Chief Executive Officer

The second consent should be executed by \_\_\_\_\_ as below:

Above the line labeled "Tax Matters Partner sign here" enter:

██████████ (EIN: ██████████) as successor in interest to  
██████████ (EIN: ██████████) \* Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████ Chief Executive Officer

With the following footnote at the bottom of the page.

\* This is with respect to the several liability of ██████████  
██████████ (EIN: ██████████) for ██████████  
(EIN: ██████████) for the taxable years ending ██████████ and  
██████████

██████████ is now a single-member entity LLC disregarded for  
federal income tax purposes. It will require two consents which  
should be executed as follows. The first consent should be  
executed by ██████████ as below.

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: ██████████), Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████ Chief Executive Officer

The second consent should be executed by ██████████ as  
below:

Above the line labeled "Tax Matters Partner sign here" enter:  
██████████ (EIN: ██████████) as successor in interest to  
██████████ (EIN: ██████████) \* Tax Matters Partner

On the line labeled "Tax Matters Partner sign here" enter:  
by ██████████ Chief Executive Officer,

With the following footnote at the bottom of the page.

\* This is with respect to the several liability of ██████████  
██████████ (EIN: ██████████) for ██████████ (EIN: ██████████) for  
the taxable years ending ██████████ and ██████████

This memorandum may contain privileged information. Any  
unauthorized disclosure of this writing may have an adverse  
affect on privileges, such as the attorney-client privilege. If  
disclosure becomes necessary, please contact this office for our  
views. If you have further questions, please contact me at  
651.290.3473 ext. (b)(6)

This advice is being submitted to the national office for a ten-day review process and may be amended or changed in accordance with direction received from the national office.

REID M. HUEY  
Associate Area Counsel  
(Large and Mid-Size Business)

By: \_\_\_\_\_  
TODD D. GUNN  
Attorney

Attachments

Pre-Reorganization Chart  
Post-Reorganization Chart